

Whither the shadow¹: The copyright protection of concepts, characters and titles

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Copyright has traditionally been said to protect expression rather than ideas. This article examines the appropriateness of this distinction in the entertainment industry in which plots, characters and formats have considerable value. In particular the author contrasts two recent New Zealand cases, Wilson which allowed the protection plots contained in summaries, and Green which refused protection for the format of a popular talent show. The author criticises the approach of the Privy Council in Green, arguing that the ideas/expression distinction is oversimplistic in a world that gives great value to ideas. He argues that many ideas are sufficiently well developed to deserve protection.

This article was awarded the 1990 Loman-Friedlander award by the New Zealand Institute of Patent Attornies.

I INTRODUCTION

Our revels now are ended; these our actors,
As I foretold you, were all spirits, and
are melted into air, into thin air...
- The Tempest, IV i

Prospero, unlike his own creator, produced his visions solely for enlightenment. He accepted that his characters and their stories would fade away. His creator did not want his characters, stories and ideas to fade away. Nor do today's creators. They are their livelihood.²

¹ Between the idea/and the reality/between the motion/and the act/Falls the shadow
TSEliot "The Hoolw Men" *Selected Poems* (Faber and Faber, London, 1982) 77, 80.

* This article was originally prepared as part of the LLB(Hons) programme. The author acknowledges gratefully the assistance of Mr C F Finlayson, counsel for both Mrs Wilson and Mr Green. Mr Finlayson let the author have a considerable amount of material on *Green* including the arguments presented by himself and Mr Laddie QC on behalf of Green as well as the arguments presented by Mr Baragwanath QC on behalf of the BCNZ. The author used this material as a guide to his research and it no doubt influenced his opinions. He would also like to thank Mr Crotty of Chapman Tripp Sheffield Young, for seeing him and giving the other side of *Wilson* and Mr J Hodder, Barrister. Any mistakes or omissions are of course the authors alone.

² See B W F Brown "Concepts - How to Protect Them" Paper presented at the LES ANZ Conference 22 March 1990. Mr Brown's article contains very valuable analysis of

Entertainment along with the computer software industry is bedeviled by the problem of protecting ideas.³ There are markets for plots and concepts.⁴ Television series are developed around an original format which sets down the overriding ideas, locations and characters. Formats make game shows like *Sale of the Century* or *Blind Date*.⁵

Ideas, characters, names and plots can be protected through a variety of devices - the tort of passing off, actions for breach of confidence and the developing statutory tort of unfair trade practice can all be used. This article examines the extent to which *copyright* should protect ideas that fall through the gaps and uncertainties of the other actions. It will first look at the difficulties associated with protecting ideas, plots and themes and will then look at examples where judges have attempted to get around the obstacles in the way of granting protection. An examination of the Privy Council decision in *Green v The Broadcasting Corporation of New Zealand*⁶ will, however, show that the conservative view not only of copyright but of the scope of intellectual property is beginning to strike back and has caused grave problems for those whose business is the creation of ideas.

II THE IDEA-EXPRESSION DICHOTOMY⁷

New Zealand copyright law is codified. Broad protection is given to *original* "literary", "dramatic", "musical" and "artistic" works.⁸ They cannot be reproduced in *any material form*.⁹ Infringement of a copyright work is by substantial copying. Infringement includes situations where the defendant copied "many of the things which gave [the material] its special individuality".¹⁰ The quality of the reproduction is more important than its quantity.¹¹ "Original" does not require originality but rather that work is the author's own.¹² Original literary works have included such things as betting slips¹³ and compilations of other people's work. The

many of the issues raised in this article and has clarified the writer's thoughts about many of them.

3 John K Halvey "A Rose by Any Other Name : Computer Programmes and the Idea Expression Distinction" (1985) 35 Copyright Symposium ASCP 1.

4 R Meadow "Television Formats - The Search For Protection" (1970) 58 Cal L R 1169.

5 *The Observer* Newspaper 3 December 1989 p 63 "Opportunity takes a hard knock".

6 *Green v Broadcasting Corporation of New Zealand* [1989] 3 NZLR 18.

7 See RY Libott "Round the Prickly Pear : the Idea-Expression Fallacy in a Mass Communications World" (1968) 16 Copyright Law Symposium ASCAP 30.

8 Section 7(1) Copyright Act 1962.

9 Above n 8 s7 (3)(a).

10 *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551, 622 per Lord Wilberforce.

11 *Ladbroke (Football) Ltd v William Hull (Football) Ltd* [1964] 1 WLR 273, 276, per Lord Reid see also the judgments of the Court of Appeal [1980] RPC 539, 545-6 per Lord Denning MR.

12 *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, 608.

13 Above n 11.

aim is to protect authors', creators' or compilers' skill in their work.¹⁴ There is one great exception to protection. Copyright is said to protect the expression of ideas, not ideas themselves. A novel cannot be "substantially copied", it is said, but its plot or characters are fair game.

Judges almost too easily observe in a wide range of cases that there is no copyright in "ideas", only in their actual expression. In the *Wham-O*¹⁵ Frisbee protection case, for instance, the judges were at pains to emphasize that they were giving protection to drawings of Frisbees rather than the conception behind them.¹⁶ The copyright protection of computer software has been greatly complicated by the Courts both in New Zealand¹⁷ and in Australia¹⁸ denying that they can protect the ideas behind software and then going through the rigmarole of finding something else about a program that they can protect. Yet computer programs are essentially ideas that solve a particular problem in a structured way.

This dichotomy's origin is historical. Its justification philosophical. Before 1911 the English Copyright Act was designed to stop the literal copying of writing or material capable of being written down. So, in *Tate v Fulbrook*¹⁹ it was decided that dramatic scenes could not be protected by copyright. The 1911 Act extended copyright, so that the totality of the dramatic form as well as its written substance could not be pirated.²⁰ Despite the legislative change, the old position is part of legal culture and is reinforced by cases like *Tate v Thomas*²¹ which concluded that a synopsis could not be copyright. The synopsis' contribution to the final play in *Thomas* was in fact minimal.

The philosophy behind the distinction is more important. Everybody involved in creative enterprise draws on common ideas developed by others. Shakespeare invented few characters and fewer plots. He drew on the ordinary to create the extraordinary. If someone could use a work to protect an idea, that person would gain a monopoly on what was previously a common idea and prevent its future development.²² Even newly created characters may become part of the common stock of ideas, as the Sherlock Holmes industry shows.²³ Unlimited copyrighting of ideas would monopolize our culture and our future.

But the theory is stretched by a world that values sophisticated concepts. There is a point where a concept ceases to be a general idea and becomes distinct. Copyright

14 *MacMillan & Co v Cooper* (1924) 93 LJPC 113.

15 *Wham-O MFG v Lincoln Industries* [1984] 1 NZLR 641.

16 *Ibid.*, 652.

17 *International Business Machines Corp v Computer Imports Ltd* [1989] 2 NZLR 79.

18 *Apple Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171.

19 [1908] 1 KB 821.

20 See Laddie, Prescott, Vitoria *The Modern Law Of Copyright* (London, Butterworths, 1980) 31-41, esp 32-33.

21 [1921] 1 Ch 503.

22 See LA Kurtz "The Independent Lives of Legal Lives of Fictional Characters" [1986] Wisc LR 429.

23 Above n 22, 424-5.

would protect only the effort and skill which makes the concept unique. Lord Hailsham, in a case about the design of interlocking cabinet doors, acknowledged the distinction. He agreed that copyright did not protect ideas but went on:²⁴

But, of course, as the late Professor Joad used to observe, it all depends what you mean by "ideas". What the respondents in fact copied was no more idea. It was ... to "follow the pattern" or "principle" ... with minor changes.

Copyright, then, often does protect delineated ideas. It often focuses on the idea behind the expression. In considering whether a book or a system of interlocking cabinets has been substantially copied, judges must be guided by not just literal similarity but also by a more fundamental connection between the copied and the original. In *Plix Products* Prichard J concluded that the system behind a complete range of Kiwi-fruit trays was protected.²⁵ In *Ladbroke*²⁶ the concept behind a system of betting slips listing football games was protected even though the infringer did not copy the exact lists. The idea could be protected if it was expressed.

Copyright gives a kind of monopoly. It is said that because of this it is unfair if a copyright is granted over ideas which are by their nature vague. Either too much would be protected or others could not be sure what was protected. This criticism fails so long as the ideas are sufficiently delineated to justify protection in the first place. Phrases like "Ideas are as Free as Air" or "Copyright protects expression not ideas" risk losing their essential truth and becoming clichés if we stop analysing the cases in front of us.

III ENTERTAINMENT AND COPYRIGHT

Many ideas are first communicated in confidence. A breach of confidence is actionable. A creative person who approaches a television producer with an idea for a programme will almost certainly get a remedy if the producer uses the idea without paying for it. There may also be an express or implied contract under which a court might be able to find damages if a producer takes a concept from a co-worker without paying for it. It has become customary to stamp story-lines, plot summaries and similar documents with "Copyright and Confidential".

The problems really begin when some one who has seen a story line in a film or a format of a television programme, pirates it. There is no link. There is no obligation of confidence. There can be no contract. A "passing off" action might work if the ideas person can establish that the producer is playing off the creator's established reputation in that area but if the programme has never been seen in that area or the creator has a

24 Above n 10, 629-630.

25 See *Plix Products v Frank M Winstone (Merchants) Ltd* (1984) 3 IPR 390 but note that the Court of Appeal dismissed the appeal on other grounds [1985] 1 NZLR 376.

26 Above n 11, Court of Appeal 546.

low profile passing off can not succeed.²⁷ Only copyright may be left to remedy the situation.

Cases which justify the non-protection of ideas tend to be cases about very broad ideas. But there are cases where well developed ideas have been protected.²⁸ An Oscar Wilde short story was infringed by a ballet based on its plot, its plot being a unique combination of otherwise common place ideas.²⁹

In *Zeccola*³⁰ the Victorian Court of Appeal found that an Italian film, "Great White", which bore a remarkable resemblance to the film *JAWS* breached the film's copyright. The court decided that the Italian film breached the copyright of the book on which the film was based. It was necessary to consider the copyright in the book because the Australian Copyright Act provides, like the New Zealand Act,³¹ that copyright in a film is infringed by actual copying or unauthorized showing or distribution. The Court accepted there could be no copyright in the general theme of a 'monster' movie but concluded "Great White" developed this theme substantially as the original novel had. It held that copyright subsisted in the:³²

[c]ombination of situations, events and scenes which constitute the particular working out or expression of the idea or theme.

The Court rejected an argument that each particular incident of the film was commonplace once the overriding "monster" story was established. It was enough that the particular sequence of events had been taken from the novel. A plot should be protected against those who take the developed plot rather than the general idea. In similar cases but in other cases without a book or other base, it might be argued that the offending movie breached the copyright in the film's script or plot outline.

In *Plix Products* Prichard J examined the traditional justification for denying protection to ideas. The first stage of a creative enterprise, the selection of a general idea or plot, "boy meets girl", and the form of presentation, such as a poem, cannot and should not be protected. There are thousands of possible love poems -the person arriving first should not claim the whole territory. But the second stage of creation, the artist's or writer's or thinker's filling in of the general concept, should be protected. As the concept is filled in, the work becomes intimately the writer's own, having now created something unique, something valuable.³³

27 This is essentially what happened in *Green*. Mr Green was denied a passing off remedy because he had an insufficient reputation in New Zealand to say that the BCNZ were playing off his reputation, see below n 55, 493-494.

28 Above n 20, 39-41.

29 *Holland v Vivian Van Dan Productions Ltd* (1936-45) MCC 69.

30 *Zeccola v Universal City Studios* (1983) 46 ALR 189.

31 Section 14(5).

32 Above n 30, 192.

33 Above n 25, 418-419.

The American Courts have long accepted that there are ideas and *ideas*. Their starting point is Hand J's "abstraction" test in *Nichols*.³⁴ He acknowledged that there are various layers of abstraction in all works. As a work is abstracted out, and the idea becomes more general, a point arrives where it is not protected. Some ideas, are however, sufficiently distinctive to be protected. The "boy meets girl" theme may not be copyright but a particular, well developed version may be. Concepts like "patterns" and "concreteness" are discussed in judgments. As patterns become more developed and more concrete or filled out the more likely they are to be protected. Mere evidence of plot similarity is not enough, as the intrinsic concept may be different even if there are factual similarities.³⁵

But the American position is far from satisfactory. Some argue that the *Nichols* test places too great an emphasis on the copyrightability of a plot, and too little on the actual copying. Copying is what copyright is about, while there is an exception for mere ideas.³⁶ Others argue that some American cases focus too much on punishing pirates for copying than considering whether a particular idea is sufficiently developed to be copied. Care is needed also to prevent too much being protected.³⁷

It is submitted that courts should move towards a test based on the programme or films being "substantially similar beyond the level of general ideas or themes". If a programme can properly be said to have copied another, then it must have taken something more than a merely general idea.

IV THE PROTECTION OF CHARACTERS

There are few English cases on protection of characters outside their protection as part of their stories.³⁸ What cases there are are not favourable; they relegate characters to mere ideas.³⁹ But they involved loose general concepts of characters, not distinctive and developed characters like Sherlock Holmes.

In the United States there has been a lot of litigation over characters outside the original storyline, Conan the Barbarian,⁴⁰ Tarzan, ET⁴¹ and Micky Mouse⁴² have all

34 *Nichols v Universal Pictures Corporation* 45 F 2d 119 (1930) per Learned Hand J.

35 *Litchfield v Spielberg* 730 F 2d 1352 (1983).

36 Above n 22, 463-466.

37 Above n 22, 458. The prime examples cited are the Tarzan cases which list Tarzan's attributes without saying why they are unique see *Burroughs v MGM* (1981) 519 F Supp 388, 391 per Werker J. Protection was granted to the concept of Tarzan on the basis of the following "Tarzan is the Apeman. He is an individual closely in tune with his environment, able to communicate with animals yet able to experience human emotions." Why any of these or even their combination made Tarzan a unique concept worthy of protection is simply not explained.

38 AJ Williamson "Copyright in Literary and Dramatic Plots and Characters" (1983-4) 14 Melb U LR 300.

39 See for instance *Kelly v Cinema Houses* [1932] MCC 362 and *Bolton v British International Pictures* [1936] MCC 20.

40 *Conan Productions Inc v Mattel* 712 F Supp 353 (1984).

featured. In one circuit, the *Sam Spade*⁴³ test protects independent characters only if they "[constitute] the story being told". This makes protection unlikely, because few characters so dominate the show. In other circuits however courts have applied the *Nichols* test to characters, especially cartoon characters. Cartoon characters are visually defined and therefore less likely to be considered abstractions than mere literary characters. In *Marty Krofft*⁴⁴ the makers of *H&R Pufenstuf* successfully upheld a claim that McDonalds had copied the style and feel of their programme in their "McDonalds' land" commercials, which used puppets and scenery which resembled those on *Pufenstuf* to create an overall impression of their hamburger restaurants. The Court adopted a two stage test, an extrinsic test of whether there had been copying, whether the two advertisements resembled each other enough to be said to be copied, and an intrinsic test of whether the copying was improper in the sense that more than just the general ideas had been reproduced. The Court held that the overall effect of the characters' appearance was more important than the somewhat marginal differences between the characters.

V THE KIDS FROM OWL AND THE MEN FROM THE BCNZ

*Wilson*⁴⁵ is a high-water mark of protection for ideas. In 1979 Mrs Wilson conceived an outline for a television programme to be called "The Kiwi Kids". The programme was to chronicle the adventures of a boy in a wheel chair and a girl on a crutch doing battle together against evil. In March 1980, she began unsuccessful negotiations with the Broadcasting Corporation of New Zealand (BCNZ). She produced a longer confidential feasibility study of about 20 pages of quite detailed story-lines. Mrs Wilson heard nothing about her concept until she read about a similar programme "The Kids From Owl" in her TV Guide. The BCNZ had developed their series from the feasibility study. Jeffries J upheld claims of breach of copyright and confidentiality.

His Honour read Mrs Wilson's outline and looked at the corporation's programme. The BCNZ programme however did differ from the outline. It had a different title, the BCNZ had worked out many of the details although Mrs Wilson had provided plot outlines. His Honour was certain that a distinctive idea had been copied. He saw something more than a base similarity. The BCNZ tried to argue that at most their producers had only taken an idea. Having considered the "mere idea argument", Jeffries J held that there existed material in which the copyright would exist:⁴⁶

The Court has little doubt that the quintessential part of the feasibility study relating directly to "Kiwi Kids" is a dramatic work within [section 7]. The dramatic work is in a material form ... it was not in the realm of unprotected ideas.

41 See above n 35, 429.

42 *Walt Disney Productions v Air Pirates* 581 F2d 751(1978).

43 *Warner Brothers v Columbia Broadcasting System* 216 F 2d 945 (1954).

44 *Sid & Marty Krofft Television v McDonalds Corp* 562 F 2d 1157 (1977).

45 *Wilson v Broadcasting Corporation of New Zealand* [1990] 2 NZLR 565 per Jeffries J.

46 Above n 45, 572.

He did not, however, indicate the formula by which he concluded that "The Kiwi Kids" was more than a bare idea. Nor did his Honour resolve the problem of a feasibility study that left details to be filled in. His Honour was by implication protecting the idea behind the outline since the outline at best contained only ideas, and the BCNZ had changed some of what details there were. Here, the copying was obvious. Jeffries J's judgment is a big leap forward, but judges must be careful about leaping too far. If the traditional approach lacks analysis so might a system in which judges in the very earnest attempt to punish copiers simply begins to protect too much. There may be times when, although there is an obvious similarity, the central idea may have been copied and yet the copiers' contribution is sufficiently great that they might be said to have created something essentially new.

VI THE PROTECTION OF TITLES

Titles suffer the same problems. They are also relegated into the realm of mere ideas. Even American Courts have traditionally rejected the protection of titles,⁴⁷ though the copyrighting of character names appears to be taking root, trademarks have greatly expanded to meet the need.⁴⁸

Titles are usually too trite or meaningless to justify copyrights.⁴⁹ The leading case of triteness involved the song "The Man that Broke the Bank at Monte Carlo"⁵⁰ which was later used as the title of a film with a different story. The combination of the phrase "The Man that broke the bank" with Monte Carlo was simply too common to gain protection even if the film producers had got the idea from the song. The decision was perhaps harsh, the songwriter had created an image in the popular mind which the film exploited, but it was only an "idea" or notion of great generality. In *Green*, the title "Opportunity Knocks" could not be protected as it was simply too trite, nor could any of the stock phrases Hughie Green used since they were by themselves simply too commonplace, the originality coming in the way they were used. Some titles which are truly original combinations and tied to definite ideas might be protected. Brevity may continue to be a problem.

Invented titles and names are not trite. However in the leading case⁵¹ the name *Exxon* was denied copyright because by itself it was meaningless. It was not a literary work since it was not designed give pleasure or information. This would affect most titles or names if they are viewed without their context. Graham J accepted that a title might be protected if it had "qualities and characteristics" in itself. He considered, for example, that "Jabberwocky" was sufficiently developed by its poem to justify protection. Some titles and names might justify protection if it could be shown that

47 J M Burcart "No Title to Titles" (1980) 32 Copyright Law Symposium ASCAP 75.

48 Above n 22, 458-461.

49 Above n 38.

50 *Francis Day and Hunter v Twentieth Century Fox* [1940] AC 112.

51 *Exxon Corp v Exxon Insurance Consultants International Ltd* [1982] 1 Ch 119.

they were defined by a well developed format or characterization. Association between a character's name and characteristics would have to be strong.⁵²

VII AN OPPORTUNITY TOO FAR?

A *The Case*

Green is the most recent (and perhaps only) Commonwealth case determining whether the format behind a television show could be protected. In America, apart from one much criticized decision, courts have generally declined to grant copyright protection to mere formats.⁵³ Hughie Green produced *Opportunity Knocks*, a talent quest, from 1956 to 1978, on British television. Each show had the same format. Each week new "artists" and last week's winner were presented. Each show had a script which determined when each performer was to appear and how each segment of the show was to be run. The show followed the same format, Hughie Green always used certain key phrases, "For [Miss Jones] opportunity knocks", referring to the television audience "This is your show and I do mean you", he interviewed sponsors, contestants was judged by applause measured by a "clapometer", but home viewers determined the ultimate result. The format made *Opportunity Knocks* and Hughie Green sold that format. It was his unique creation.

In 1978 South Pacific Television, which was ultimately under the control of the BCNZ, "created" their own "*Opportunity Knocks*". They did not even tell Green. The Courts accepted that BCNZ had lifted his idea. Copyright could, it was argued, exist either in the format described in the programme's script or in the format recorded in the actual programmes.

At first instance Ongley J⁵⁴ doubted the general format approach, but in his judgment the claim for copyright ultimately failed because there was doubt whether scripts existed. The scripts were not presented in the High Court but Green mentioned them casually in his evidence. In the Court of Appeal⁵⁵ Somers and Casey JJ accepted that there had been scripts but denied copyright.

Somers J opined that as the scripts themselves were incapable of being performed they could not be dramatic works,⁵⁶ nor could they be literary works since they expressed only ideas about how to run a talent show. Taken item by item the various elements would not be able to be copyrighted nor could their combination.⁵⁷

52 Above n 38.

53 Above n 4, 1177-1179, M Nimmer and D Nimmer *Nimmer on Copyright* (1983, Times Mirror Books) at 16.62.

54 *Green v Broadcasting Corporation of New Zealand* (1983) unreported, High Court, 22 December 1983 A662/79, Wellington.

55 [1988] 2 NZLR 490.

56 Above n 55, 497.

57 Above n 55,497.

Casey J decided that Green had failed to present sufficient evidence about the content of the scripts and therefore he could point only to general similarities which could not by themselves justify copyright protection. After considering whether the format described in the scripts was protected, he concluded that while Green's ideas had been taken they were merely *ideas*. The freedom to create and market ideas should in his Honour's opinion remain an important consideration; reform should be left to the legislature.⁵⁸

Gallen J dissented. He would have recognized protection on the basis that the BCNZ had copied substantive features of Green's programme which made it distinctive from a mere talent quest. He could not square Ongley J's finding that the BCNZ's programme contained distinctive features taken from Green's programme and his decision not to find copyright. If the features were substantive enough to be distinctive then, in Gallen J's view, they had to be substantive enough to be protected. He found the copyright not in the scripts but in the format itself. Gallen J considered the question was whether a "sufficient structure" existed within the work itself to justify protection.⁵⁹

B *Is Writing Necessary?*

The traditional view is that even for musical and dramatic works, there has to be some writing or notation before there can be a copyright.⁶⁰ Copyright started off as a means to protect literary works. Dramatic works and music were added by accretion.

In *Green* the Court of Appeal, reversing Ongley J's conclusion, accepted that writing was not necessary for dramatic works to be copyrighted.⁶¹ In particular section 3(8) provides that copyright is protected from the time that a work is reduced to writing "or some other material form". The judges accepted that "material form" refers to musical and dramatic works. Both Somers and Casey JJ appeared to think that material form could be achieved through making the performance permanent by taping it. Casey J although denying copyright made the point well.⁶²

It is the performance which attracts copyright as a dramatic work and there is no claim that anyone of Mr Green's ever changing shows was copied.

He concluded that there was no reason to limit the meaning of section 3(8).⁶³ This approach is right in policy. It reflects the reality of the performing arts. Protection of something that lives off the page should not depend on it first being on a page. It also

58 Above n 55, 504-505.

59 Above n 55, 512.

60 See E P Skone James, J F Mummery et al *Copinger and Skone James on Copyright* (London, Sweet & Maxwell, 1980) 63, para 164.

61 Above n 55, 497.

62 Above n 55, 502.

63 Above n 55, 503.

accords with the Berne Convention Revision of 1948 which aims to protect material "fixed in writing or otherwise".⁶⁴

Gallen J, having seen the importance of format read, "material form" as requiring "some enduring and accessible form". He also considered that each script, in fixing the structure of the programme, was also a rendering into "material form". But, as Gallen J appeared to acknowledge, this reasoning ought to apply to situations where there is no script but merely the video taping of television game shows. Taping records just as well, if not more appropriately, the format of the show.⁶⁵

But this approach itself does not go far enough. The extension of Gallen J's format theory is that performance is the means by which a format is expressed rather than the object of protection itself. But if that is so why should protection of format necessarily depend upon the rendering of performances in a permanent form? The performance itself might be said to be the "material" form of the concept in a reality which can be observed by others, the external manifestation of what has up till then been someone's thoughts. A travelling road show comedy play might be played hundreds of times without being written down. Similarly Jazz performances are often improvised. Music and drama are ephemeral things, which is part of their charm. If the heart of copyright is the unauthorized copying of another's work why should the ephemeral not be protected?

But Casey and Somers JJ's approach is clearly the more orthodox one. It gains support from the interpretation of "material form" in a number of computer software cases in which it was denied that an "object code" (the form in which a programme is understood by the computer) could be in material form since it was kept in ever changing electronic flux within the computer.⁶⁶ If there is a permanent recording of something it might be easier to establish whether it had been copied. But surely evidential problems are bridges that can be crossed when they have to be. If someone can overcome the obvious difficulties in establishing that a work that existed momentarily has been infringed why should they not succeed? Another problem with this approach is that it erodes the exact copying or rebroadcast requirement for infringement of copyright in film or television programmes. On the other hand, it recognizes that "dramatic works" are given wide protection by the Act, and so it makes that protection more real.

C *A Missed Opportunity?*

The Privy Council tersely dismissed Green's appeal. The evidence presented about the content of the scripts was "exiguous in the extreme".⁶⁷ His programmes lacked sufficient certainty. More importantly Lord Bridge implied that a format show of this

64 Under Article 2(1). See Brown and Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) 231-2.

65 Above n 55, 512.

66 Above n 18, 410-411.

67 Above n 6, 19.

kind would struggle for protection. He remarked on the difficulty of describing the nature of the thing Green was claiming protection in. Somewhat remarkably, in light of the language used in the subsequent newspaper stories about *Green*, he disputed that what Green was asking to be protected was even a format:⁶⁸

It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and the aid of particular accessories.

A presentation format lacks sufficient unity to be performed and therefore cannot be described as a dramatic work. Gallen J's position was struck down on this basis rather than because of a lack of writing.

No one should own a particular type of show. But a copyright here would not have granted Green the ownership of talent shows or even talent shows similar to his. What Green wanted was protection of his labour and skill in developing a way of presenting such a show that was so successful that others copied it. The Privy Council and the majority in the Court of Appeal failed to take into account Lord Reid's observations in *Labroke*⁶⁹ that the *combination* of unoriginal material can itself be copyright. Indeed Lord Reid established that it was wrong to break something down into its constituent parts merely to show that by themselves the individual parts could not be copyrighted.

The Privy Council could have reached the same result with more satisfactory reasoning. *Green* was on its facts a very difficult case in which to claim protection. The format was slight, the evidence presented was not conclusive. Indeed in a recent debate in the House of Lords on an amendment aimed to protect programme formats several of their Lordships considered that the copyright pronouncements were strictly obiter because the case was really about the inadequate evidence presented in the High Court.⁷⁰ But surely the better approach would have been to consider whether Green's format was sufficiently developed to deserve protection. Saying that game shows have an element of uncertainty ignores that game shows are all about uncertainty. Format shows like *Mastermind* or *This is Your Life* may have a better chance of protection because they are perhaps more defined but they could also be dissected to appear absurd, just as the Privy Council dissected "*Opportunity Knocks*". It would appear the more writing there is, the greater the chance of protection. But then formats live on television screens, not on printed pages.

D *A Return to Basics or Forgetting the Future?*

Green should not have been a surprise. It is the inheritor of a long tradition, which owes more to outmoded logic than present experience. The idea-expression distinction

68 Above n 6, 20.

69 Above n 11, 277.

70 See Lord Lloyd of Kigerran in *Parliamentary Debates (Lords)* (UK) 26 July 1990, 1730.

has become deeply enshrined in the ways judges and lawyers approach copyright problems. To ask them to decide differently is to ask them to change the way they think about copyright.

But *Green* is also the offspring of a much more conservative approach to judging which has seen the English House of Lords look sideways at the far reaching developments of the 1970s and early 1980s. The most noticeable example of such judicial retreat has been the steady destruction of Lord Wilberforce's liability expanding *Anns*⁷¹ two stage test for a duty of care in negligence culminating in its recent reversal in *Murphy*.⁷²

A similar trend has occurred in intellectual property law especially in the area of industrial design. Brilliant counsel, doing what lawyers have always done when faced with a difficult case, pushed the words of the Copyright, the Trademarks and the Industrial Design Acts to their limit to fit their clients' cases within the recognized protection schemes. Industrial objects like cabinets were being copied, for various reasons they could not or were not patented, so counsel argued that through a doctrine of indirect copying these cabinet pirates breached the copyright in the original design.⁷³ Copyright, originally intended to protect authors or painters, was protecting design engineers. Limits had to be found and over the past five years the House of Lords has been leading a fight back to dispel the myth that:⁷⁴

for every mischance in an accident prone world someone somewhere must be liable for damages.

The spare parts exception was established to prevent manufacturers exploiting intellectual property law to create monopolies in the spare parts markets for the goods.⁷⁵ The makers of audio tape reproduction systems were not liable in conspiracy when others used their equipment to breach the plaintiff's music copyright.⁷⁶ A Coke bottle remained (in a judgment whose terseness and brevity is threatened only by *Green*) a functional object and not a registrable trade mark.⁷⁷ Lego block designs condemned as "uninspired and uninspiring engineering drawings" were denied a copyright which would have effectively renewed lego's expiring patent.⁷⁸ Now *Green* has decided much to everyone's surprise that formats in game shows are not protected. Lord Bridge's dismissal of the format as a "repeated but unconnected use of set phrases ... with the aid of particular accessories" presaged the result.

71 *Anns v Merton London Borough* [1978] AC 728.

72 *Murphy v Brentwood District Council* [1990] 2 WLR 414.

73 Above n 11.

74 *CBS Songs v Amstrad Consumer Electronics plc* [1988] 2 All E R 484, 497.

75 *British Leyland Motor Corp v Armstrong Patents Ltd* [1986] RPC 279.

76 Above n 74.

77 *In Re Coca-Cola Co's Application* [1986] 2 All E R 274.

78 *Interlego AG v Tyco Industries Inc* [1988] 3 All E R 949, 966.

But as much as the claw back was inevitable and perhaps necessary, it is doubtful that much was served by the Privy Council's brevity and terseness. It is just as much a myth to say that all judicial extension is necessarily bad as it to say that it is necessarily good. Development should be principled. Progress restrained but not stopped. There are problems in intellectual property law. But an indication in *Green* that protection might have been granted in a clearer case would have answered a great need and recognized simple commercial reality.

E AN ALTERNATIVE APPROACH?

In contrast, the Australian courts have moved to protect plots, themes, character names and even ideas. In the *Crocodile Dundee* cases they have done it through extending the tort of passing off to include situations where merchandising rights were being misused or simply stolen. Traditionally passing off relied on a misrepresentation in the minds of the audience as to origins of goods or services.⁷⁹ Few, if any of the audience of a TV advertisement or shoppers in a country store stop to consider whether Paul Hogan had given his permission for "Dundee" to be used. But the Australian courts expanded the tort to protect valuable merchandising rights in situations where "Dundee" was being fixed to everything in sight.⁸⁰ The Federal Court of Appeal has stretched protection further to include an advertisement based on a spoof of a scene from the movie.⁸¹ But is passing off entirely appropriate? The advertisement was a spoof on a scene which had entered Australian culture. One wonders whether a copyright action, turning more on the impropriety of taking, might be a more appropriate safety valve.

The *Dundee* cases also raised the prospect that there might be a successful claim under section 52(1) of the Trade Practices Act 1974 (Aust) which like s 9 of the Fair Trading Act 1986 (NZ) prohibits misleading conduct.⁸² These sections have been creatively received by both judges and lawyers keen to use their wide phrasing to do what could not be done in the past. Foster J⁸³ used s 52 to resolve a dispute in which Yardley of London accused its advertising agency of stealing its "footballer of the year" competition designed to promote its deodorant. In promoting itself as the owner of the idea, the company was guilty of an actionable misrepresentation. In effect, this protects the pure idea. Yet one wonders whether the legislation is really the right vehicle. Foster J's decision was predicated on there being something to own, yet the law recognizes at the moment no such right to ownership of mere ideas. The advocates of this approach may be straining notions of passing off or unfair competition beyond their natural extent. Broad statutes need a great deal of filling in.

79 See *Wombles Ltd v Wombles Skips Ltd* [1977] PRC 99.

80 See *Hogan v Koola Dundee Pty Ltd* (1989) 83 ALR 187.

81 *Pacific Dunlop Ltd v Hogan* [1989] 87 ALR 14.

82 Section 9 reads "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

83 *Yardley of London (Australia) Pty Ltd v Chapman & Lester The Sales Promotion Agency Pty Ltd* (1990) ATPR 40,989, 50,854.

VIII CONCLUSION

The sweeping tone in *Green* has outraged the entertainment community in England. There are calls for legislation. Indeed a move to insert an amendment in the British Broadcasting Bill to protect formats was withdrawn after gaining promises that there would be further consultation. Certainly there is need for change, not just in legislation but in the way lawyers and judges attack these kinds of problems. There are real difficulties in defining what makes format programmes unique. Identifying what should be protected may not be easy but it is better than hiding behind worn-out logic. Practically, however, the economic power of the large television companies may prevent excessive pirating. Ultimately, the thought of an eleven year legal battle may be encouragement enough to buy rights than to pirate them.⁸⁴ The protection of formats is perhaps one idea which has not succeeded in Privy Council but it may in the future.

84 Above n 5.

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